

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Waiver Of C. Specialties, Inc.)	CG Docket No. 02-278
)	
)	CG Docket No. 05-338
)	
)	

**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)
OF THE COMMISSION'S RULES**

Eric L. Samore
Erin A. Walsh
SmithAmundsen LLC
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200 (ph)
(312) 894-3210 (fax)
esamore@salawus.com
ewalsh@salawus.com

TABLE OF CONTENTS

I. BACKGROUND.....	2
A. The TCPA And Its Implementing Regulations.....	3
B. The Original Waiver Order.....	4
B. Subsequent Waiver Orders.....	5
II. C. SPECIALTIES SHOULD BE GRANTED A WAIVER OF THE REGULATION.....	6
A. C. Specialties Is Similarly Situated To The Waiver Recipients.....	6
B. Good Cause Exists For Waiving The Regulation	6
III. IN THE ALTERNATIVE, DECLARATORY RULING IS PROPER.....	8
IV. CONCLUSION.....	9

PETITION FOR RETROACTIVE WAIVER AND/OR DECLARATORY RULING

Pursuant to Section 1.3 of the Rules¹ of the Federal Communication Commission (the “Commission”), and the Commission’s Order dated October 30, 2014 (“Original Waiver Order”),² Petitioner, C. Specialties, Inc. (“C. Specialties”), respectfully requests that the Commission grant C. Specialties a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules (the “Regulation” or “Rule”), to the extent the Regulation may apply to any faxes transmitted by C. Specialties (or on its behalf) with the prior express permission of the recipients or their agents.

In its Original Waiver Order, the Commission clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Commission’s Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation (“solicited fax advertisements”) and must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii).³ At the same time, the Commission recognized that “good cause” exists for granting a retroactive waiver of the Rule—specifically, the state of justified, industry-wide confusion, which has given rise to substantial liability for inadvertent violations.⁴ Accordingly, the Commission retroactively waived compliance with Section 64.1200(a)(4)(iv) for the petitioners through April 30, 2015 and invited similarly situated parties to seek the same relief.⁵

Good cause exists for granting C. Specialties’ request for a retroactive waiver. C. Specialties is similarly positioned to other waiver recipients. It has been subject to the special

¹ 47 C.F.R. § 1.3; 5 U.S.C. § 554 (e).

² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (“Original Waiver Order”).

³ Original Waiver Order, ¶ 1.

⁴ *Id.* at ¶¶ 23-28, 48, *ref.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”).

⁵ *Id.* at ¶¶ 2, 29-30, 48.

circumstances addressed in the Original Waiver Order, including confusion regarding proper application of the Regulation, caused by an inconsistent footnote in the Junk Fax Order and lack of explicit notice. As a result, C. Specialties is facing the possibility of substantial costs or liability, such that waiver is in the public interest.⁶ For these reasons, and those set forth below, C. Specialties respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iii).

Alternatively, pursuant to Sections 1.2 and 1.3 of the Rules,⁷ C. Specialties requests that the Commission issue a declaratory ruling to clarify: (a) the Rule applies to unsolicited advertisements, only; or, (b) the Rule's statutory basis is not 47 U.S.C. § 227 (b). Clarification in either regard will provide necessary guidance and is consistent with the text and goals of the Act.

I. BACKGROUND.

C. Specialties is small company that has sold animal care products since 1986. It is currently facing a putative class action lawsuit by Shaun Fauley ("Fauley"), *Shaun Fauley v. C. Specialties, Inc.*, 15-cv-05581 (N.D. Ill.), for the alleged faxing of an advertisement on May 7, 2013. In particular, Fauley alleges that the fax "did not display a proper opt-out notice as required by 47 C.F.R. § 64.1200" and that, consequently, C. Specialties is "precluded from asserting any prior express permission or invitation."⁸

C. Specialties denies that the subject faxes were "unsolicited"⁹ and asserts that it obtained prior express consent.¹⁰ For his part, Fauley claims that he did not consent.¹¹ However, these factual disputes are properly resolved in the private lawsuit and not relevant to this Petition.¹²

⁶ *Id.* at ¶¶ 24-27.

⁷ 47 C.F.R. §§ 1.2 and 1.3; 5 U.S.C. § 554 (e).

⁸ Class Action Complaint, *Fauley*, Dkt #1, ¶¶ 18, 39 (filed Jun. 23, 2015).

⁹ Answer And Affirmative Defenses, *Fauley*, Dkt. # 15 at ¶¶ 18, 39 (filed Aug. 19, 2015).

¹⁰ *Id.* at p. 19.

¹¹ Class Action Complaint, *Fauley*, Dkt #1, *gen.*

A. The TCPA And Its Implementing Regulations.

The TCPA prohibits faxing unsolicited advertisements—those sent “without prior express invitation or permission.”¹³ The Junk Fax Prevention Act of 2005 (“JFPA”) amended the TCPA and codified the established business relationship (“EBR”) defense for unsolicited advertisements sent pursuant to relationships that Congress recognized as implying consent.¹⁴ At the same time, Congress concluded that exempting these unsolicited advertisements from liability might result in some continued unwanted faxing. Consequently, the JFPA specifies that to come within the safe-harbor of an EBR,¹⁵ unsolicited fax advertisements must include an opt-out notice to inform recipients how to stop future faxes.¹⁶ The JFPA does not mention the Regulation or extend the opt-out requirement to *solicited* fax advertisements.

The Commission’s Junk Fax Order is the first articulation of any requirement for opt-out language on solicited fax advertisements—indeed, none was referenced in the Notice of Proposed Rulemaking.¹⁷ The Junk Fax Order implemented the requirements for asserting the “EBR” safe-harbor for unsolicited faxes and, through adopting the Rule, sought to extend those requirements to *solicited* advertisements.¹⁸ Concurrently, however, the Commission stated: “the opt-out notice requirement only applies to communications that constitute unsolicited

¹² Original Waiver Order, ¶ 26; *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (Aug. 28, 2015) (“Aug. 28 Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015) (“Dec. 9 Waiver Order”).

¹³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227; 47 U.S.C. § 227 (a)(5) and (b)(1)(C)(the definition of “unsolicited advertisement” has not been amended).

¹⁴ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

¹⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Red 8752 1 54 (1992).

¹⁶ 47 U.S.C. § 227(b)(2)(D).

¹⁷ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, Notice of Proposed Rulemaking, 20 FCC Rcd. 19758, 19767-70 (2005)(“Junk Fax NPRM”).

¹⁸ Junk Fax Order, 21 FCC Rcd at 3812.

advertisements.”¹⁹ The Commission did not identify any statutory authority to support the Rule.²⁰ Yet, it created a cause of action and potential liability that are found nowhere in the Act.

B. The Original Waiver Order.

The Commission issued its Original Waiver Order in response to challenges to the Rule. The Commission declined to invalidate its Rule.²¹ At the same time, it acknowledged—given the unique backdrop of the Rule’s inception and its subsequent impact on liability—that requiring draconian, retroactive adherence is not in the public interest and granted retroactive waivers.

The Commission determined that the following “good cause” exists for waiving the Rule.²² First, special circumstances warrant deviation. Specifically, the inconsistent footnote in the Junk Fax Order and lack of explicit notice created “confusion” and engendered “misplaced confidence” that the opt-out rule does not apply to solicited fax advertisements.²³ Second, waiver is in the public interest. Inadvertent violations—arising after the Junk Fax Order when the industry was afflicted by understandable confusion—could result in inadvertent violations and substantial liability.²⁴ Thus, the Commission granted waivers to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules” through April 30, 2015 and invited “similarly situated” parties to seek the same waiver.²⁵

¹⁹ *Id.* at 3809, n. 154 (herein, the “footnote”).

²⁰ *See id.* ¶64 (locating authority for all rules adopted in the order under “sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended”).

²¹ Original Waiver Order, ¶ 1.

²² *Id.* at ¶¶ 23-28, 48.

²³ *Id.* (“the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient”).

²⁴ *Id.* at ¶ 27.

²⁵ *Id.* at ¶¶ 24-25.

The Commission declined to resolve factual disputes. It granted waivers without “confirm[ing] or deny[ing] whether [the] petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”²⁶ The Commission also did not make any evidentiary rulings regarding whether there was actual, individual confusion.²⁷

C. Subsequent Waiver Orders.

Since the Original Waiver Order, the Commission has granted 122 retroactive waivers in two subsequent orders (“Subsequent Waiver Orders”).²⁸ It reaffirmed that the waivers are supported by good cause in the public interest²⁹ and may be granted even after April 30, 2015.³⁰

The Commission has continued to refrain from requiring that petitioners demonstrate consent,³¹ explaining “waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.”³² It has also declined to require proof or pleading of “specific, detailed grounds for individual confusion.”³³ Instead, the Commission “established that petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.”³⁴ This presumption cannot be rebutted by the inclusion of a

²⁶ *Id.* at ¶ 31.

²⁷ *Id.* at ¶ 26.

²⁸ Aug. 28 Waiver Order, ¶ 11; Dec. 9 Waiver Order, ¶ 1.

²⁹ Aug. 28 Waiver Order, ¶ 13; Dec. 9 Waiver Order, 12.

³⁰ Aug. 28 Waiver Order, 20; Dec. 9 Waiver Order, ¶ 18.

³¹ Aug. 28 Waiver Order, ¶ 17; Dec. 9 Waiver Order 16.

³² *Id.*

³³ Dec. 9 Waiver Order, ¶ 17; *see also* Aug. 28 Waiver Order, ¶ 15.

³⁴ Aug. 28 Waiver Order, ¶ 14.

“limited opt-out notice” or a prior lawsuit.³⁵ Thus, every petitioner that “referenced the confusion between the footnote and the rule” has been granted the same retroactive waiver.³⁶

II. C. SPECIALTIES SHOULD BE GRANTED A RETROACTIVE WAIVER.

C. Specialties falls squarely within the class of persons for whom the Commission intended to retroactively waive its Rule. It is “similarly situated” to the waiver recipients and equivalent good cause supports this Petition. Thus, C. Specialties should receive the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission has provided similar parties.

A. C. Specialties Is Similarly Situated To The Waiver Recipients.

C. Specialties has been sued in a putative class action lawsuit for an alleged violation of the Act and the Rule despite its assertion that the faxes were not unsolicited.³⁷ This alleged violation occurred on May 7, 2013, when there was reasonable confusion regarding the Rule—after the Junk Fax Order and before the Original Waiver Order.³⁸ The conflicting footnote in the Junk Fax Order and the lack of notice subjected C. Specialties to the same confusion as the other waiver recipients, such that it had no legal certainty that an opt-out notice is required for solicited faxes.³⁹ For these reasons, C. Specialties is “similarly situated” to the waiver recipients.

B. Good Cause Exists For Waiving the Regulation.

Commission may “at any time” waive its own regulations for good cause.⁴⁰ “Good cause” exists where there are “special circumstances warranting an exception in the public interest.”⁴¹ The Commission has already found both elements with regard to Section 64.1200(a)(4)(iv),

³⁵ Aug. 28 Waiver Order, ¶ 18.

³⁶ Dec. 9 Waiver Order, ¶ 14.

³⁷ Answer *Fauley*, Dkt. #15 at ¶¶ 18, 31, p. 19; Original Waiver Order, ¶ 11.

³⁸ Complaint, *Fauley*, Dkt. #1 at ¶ 31, Exh. A; Original Waiver Order, ¶¶ 2, 24-27.

³⁹ Original Waiver Order, ¶ 27.

⁴⁰ 47 C.F.R. § 1.3; *Keller Commc'ns, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (D.C. Cir. 1997).

⁴¹ *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (D.C. Cir. 1999).

granting retroactive waivers to nearly one-hundred and fifty petitioners.⁴² Equivalent “special circumstances” and “public interest” concerns exist with regard to C. Specialties, such that retroactive waiver of the Regulation is warranted.

First, the special circumstances already detailed by the Commission counsel in favor of deviation from the Rule with regard to C. Specialties. The “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of notice—resulted in “misplaced belief” that the opt-out notice requirement does not apply to solicited fax advertisements.⁴³ C. Specialties was affected by this “confusing situation,” lacked certainty regarding the scope of the Rule and is now accused of a violation that allegedly occurred after the Junk Fax Order.⁴⁴

Second, granting C. Specialties a retroactive waiver is in the public interest.⁴⁵ Public interest favors shielding businesses from inadvertent violations given the generalized confusion:

[F]ailure to comply with the rule—which...could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages...it serves the public interest...to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations...⁴⁶

Waiver in C. Specialties’ case serves the same public interest concerns that the Commission sought to ameliorate through its prior waiver orders. C. Specialties faces a potential class action lawsuit for an alleged violation of the Act and Rule that occurred after the Junk Fax Order; and, has asserted that the subject fax was a *solicited* transactional communication. And, as the Commission has acknowledged, any “misplaced confidence” and lack of certainty regarding the Rule on the part of petitioners, similarly situated to C. Specialties, was reasonable, and may have resulted in unknowing, inadvertent violations. Similarly, C. Specialties’ alleged failure to include

⁴² Original Waiver Order, ¶ 36.

⁴³ *Id.* at ¶¶ 15, 23-26, 27-28.

⁴⁴ Complaint, *Fauley*, Dkt. # 1 at ¶ 31, Exh. A.

⁴⁵ *Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

⁴⁶ Original Waiver Order, ¶ 27.

a “proper” opt-out notice may leave it vulnerable to claims for violation of the Regulation—no matter how inadvertent. Thus, retroactive waiver of the Rule, here, is in the public interest.

For these reasons, there is good cause to retroactively waive the Rule as to C. Specialties.

III. IN THE ALTERNATIVE, A DECLARATORY RULING IS PROPER.

As an alternative to granting C. Specialties a retroactive waiver, the Commission should issue a declaration ruling to clarify: (1) Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements; or, (2) Section 227(b) of the TCPA is not the legal basis of the Rule.

Initially, clarification that the Regulation does not apply to “solicited” facsimiles is proper for at least three reasons. First, the text of the Rule and the Commission’s orders is unclear and, as currently implemented, inconsistent with the Act. Indeed, the Act’s prohibitions are confined to “unsolicited advertisements,”⁴⁷ as are the Commission’s regulations. Section 64.1200(a)(4)(iv) stands alone, with no basis in the statute or any other provision of the Commission’s rules.⁴⁸ Second, as the Commission has acknowledged,⁴⁹ application of Section 64.1200(4)(iv) to solicited fax advertisements exceeds the Commission’s authority under the JFPA and the Communications Act.⁵⁰ Third, requiring opt-out language on solicited faxes—as Section 64.1200(a)(4)(iv) purportedly contemplates—runs contrary to the First Amendment.⁵¹

Separately, the Commission may resolve this uncertainty by clarifying that the basis for the Rule is not Section 227(b)—indeed, this should have been accomplished when the Rule was

⁴⁷ *E.g.*, 47 U.S.C. § 227 (b)(1)(C); *see also Biggerstaff v. F.C.C.*, 511 F.3d 178, 182 (D.C. Cir. 2007).

⁴⁸ Junk Fax Order, 21 FCC Rcd at 3788-89, 3791

⁴⁹ *Id.* at 3810, n.154, 3788-89; JFPA NPRM, FCC Rcd at 19,758.

⁵⁰ 47 U.S.C. §227(b)(1)(C), (D); *see also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002); *Fed. Mar. Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1972); *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013); *Util. Air Reg. Group v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014), *citing University of Tex. Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2529 (2014).

⁵¹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY.*, 447 U.S. 557, 566 (1980); *Greater New Orleans Broad. Ass’n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999); *Edgefield v. Fane*, 507 U.S. 761,770-71 (1993).

enacted.⁵² That Section 227(b)(2) cannot serve as the statutory basis for the Rule, if any such basis exists, is clear. The Rule does not align with the language, legislative history or purpose of Section 227(b)—all of which are squarely limited to “unsolicited” fax advertisements.⁵³

IV. CONCLUSION.

For all of these reasons, Petitioner, C. Specialties, Inc., respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the October 30, 2014 Waiver Order for any solicited faxes sent after the effective date of the Regulation through April 30, 2015. Alternatively, Petitioner respectfully requests that the Commission issue a declaratory ruling, clarifying: (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements; and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules.

Respectfully submitted,

By: /s/ Erin A. Walsh

SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200 (ph)
(312) 894-3210 (f)

Counsel for C. Specialties, Inc.

⁵² An agency engaging in rulemaking must include a “reference to the legal authority under which the rule is proposed” in its notice of proposed rulemaking, and provide “a concise general statement of [the rule’s] basis and purpose” in its final rule. 5 U.S.C. § 553(b)(2), (c); *Home Box Office Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

⁵³ *Supra* at pp. 3-5.